

NO. 48897-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BUD RICHARD FLOWERS,

Defendant/Appellant.

Appeal from Cowlitz County Superior Court
Honorable Michael H. Evans
No. 13-1-01314-0

SECOND AMENDED
BRIEF OF APPELLANT

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I. INTRODUCTION

Inadmissible evidence was provided at re-sentencing that unfairly prejudiced Defendant, unduly encouraging the sentencing court to simply re-punish him to the maximum of the standard range yet again. Additionally, the erroneous dates of his burglary act in Utah, along with insufficient evidence of its compatibility to Washington, warrant a removal of that crime from his offender score.

II. ASSIGNMENTS OF ERROR

A. The sentencing court erred when it was provided and considered the former sentencing court's vacated sentence.

ISSUE:

Whether a sentencing determination vacated on appeal is inadmissible and prejudicial under ER 403 at the re-sentencing hearing?

B. The sentencing court erred when it made a finding that defendant's prior Utah conviction constituted a crime for purposes of his offender score; specifically, insufficient evidence was provided that the Utah burglary would have constituted the same crime in Washington.

ISSUES:

Whether a prior crime may count towards a defendant's offender score when the dates of the crime and respective conviction are incongruous on the Judgment and Sentence?

Whether a foreign conviction may count towards a defendant's offender score when the foreign statute has a broader definition of the crime than Washington?

III. STATEMENT OF CASE

On June 23, 2014, Defendant appealed a conviction at trial on two counts: Attempted Murder in the First Degree with Firearm Enhancement, and Unlawful Possession of a Firearm in the First Degree. On December 14, 2015, a Mandate from the Court of Appeals rejected the entirety of his appeal except for an incorrect calculation of his offender score at sentencing. Because certified copies of Defendant's past and current crimes were not provided at sentencing, the Court of Appeals ordered that the matter be remanded for re-sentencing. See *Mandate*, CP 3-19. On March 8, 2016, at re-sentencing, upon proper presentation of certified copies, Defendant was sentenced to 471 months for Attempted Murder and 116 months for Unlawful Possession, concurrent. Defendant appeals.

IV. ARGUMENT

A. **The sentencing court erred when it was provided and considered the former sentencing court's vacated sentence.**

At re-sentencing, the State provided and cited the former Judgment and Sentence that had been vacated by the Court of Appeals in their Mandate. VRP 19. Specifically, the State noted that Defendant was previously sentenced to 471 months and 116 months, the maximum of the standard range. This evidence of a vacated order was inadmissible under ER 403, which states as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons. *State v. Fualaau*, 155 Wn.App. 347, 356, 228 P.3d 771, 131 S.Ct. 1786, 179 L.Ed.2d 657 (2011). Where the trial court has discretion and fails to exercise it, it has abused its discretion. *State v. Flieger*, 91 Wn.App. 236, 242, 955 P.2d 872 (1998).

Here, the former sentencing court's vacated sentence posed only unfair prejudice to Defendant. The former sentence was based on convictions that had not been certified and the appellate court properly vacated the sentence on that ground. By providing the former court's sentence, the present court was encouraged to simply follow what had already been done, prejudicing Defendant's right to have a new sentencing hearing.

B. The sentencing court erred when it made a finding that Defendant's prior Utah conviction constituted a crime for purposes of his offender score; specifically, insufficient evidence was provided that the Utah burglary would have constituted the same crime in Washington.

1. LAW

To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. *State v. Wiley*, 124 Wn.2d 679, 684, 880 P.2d 983 (1994) (citing *State v. Franklin*, 46 Wn.App. 84, 729 P.2d 70 (1986), rev'd on other grounds sub nom. *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987)); see also *State v. Mutch*, 87 Wn.App. 433, 437, 942 P.2d 1018 (1997) (citing *State v.*

Luckett, 73 Wn.App. 182, 187-88, 869 P.2d 75, review denied, 124 Wn.2d 1015, 880 P.2d 1005 (1994)). More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed. *Mutch*, at 437. If the foreign conviction is comparable to a Washington crime, it counts toward the offender score as if it were the equivalent Washington offense. If the elements are not identical, or if the foreign statute is broader than the Washington definition of the particular crime, the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute. *State v. Duke*, 77 Wn.App. 532, 535, 892 P.2d 120 (1995). *Mutch*, at 437. *See also, State v. McCorkle*, 88 Wn.App. 485, 495, 945 P.2d 736 (1997) ("The key inquiry is under what Washington statute could the defendant have been convicted if he or she had committed the same acts in Washington.")

In Utah, burglary is defined as:

76-6-202. Burglary.

- (1) An actor is guilty of burglary who enters or remains unlawfully in a building or any portion of a building with intent to commit:
 - (a) a felony;
 - (b) theft;
 - (c) an assault on any person[...]

A building is defined in Utah as follows:

76-6-201. Definitions.

- (1)(a) "Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, or other structure or vehicle adapted for overnight

accommodation of persons or for carrying on business and includes: [...]

In Washington, a “building” or “premises” is defined in RCW 9A.52.010, which does not specifically include a watercraft or aircraft as it does in Utah; however, Washington does have a more detailed description of what types of vacant lots are considered “premises.”

2. ANALYSIS

Here, Defendant had a prior conviction in Utah for burglary from October 1990, that was included as a “prior” in his offender score. Utah’s definition of burglary is broader than Washington’s because it includes watercraft and aircraft, which triggers an analysis pursuant to *State v Duke* cited above. At re-sentencing, the State provided the probable cause statement from the Utah conviction which stated that “[o]n or about November 14, 1990, at 168 E. 5900 South, in Salt Lake County, the Defendant, Bud Flowers [...] enter[ed] or remained unlawfully in the building of Dr. Weems and Dr. Crane with an attempt to commit a theft.” VRP 23.

First, it should be noted that the Judgment and Sentence for the present matter indicates that the “Date of Sentence” for the Burglary was October 7, 1990, yet the Date of Crime is somehow November 15, 1990. See Judgment and Sentence, CP 90-102. It is, of course, impossible that the Defendant was sentenced for a crime more than one month before it was committed.

Second, insufficient evidence was presented that the offices of the Utah doctors were not an aircraft or watercraft. While this may seem a fine

distinction, *Duke* and *McCorkle* both require that the analysis be undertaken by the sentencing court nonetheless. It is not clear that Defendant would have been convicted for burglary had Defendant's acts been charged under Washington's statute.

For both of these reasons, the trial court abused its discretion when it made a finding that Defendant's Utah burglary constituted a "prior." Defendant's offender score should accordingly be adjusted.

V. CONCLUSION

Inadmissible evidence was provided at re-sentencing that unfairly prejudiced Defendant, unduly encouraging the sentencing court to simply re-punish him to the maximum of the standard range yet again. Furthermore, the erroneous dates of his burglary act in Utah, along with insufficient evidence of its compatibility to Washington, warrant a removal of that crime from his offender score.

Respectfully submitted this 20th day of September, 2016.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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Amended brief with Issues Pertaining to Assignments of Error added.

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